No. 80-955

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

RECEIVED
JUN 4 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

MICHAEL R. WENGER, Commissioner, West Virginia Department of Employment Security, J. F. McCLANAHAN, CLARENCE ELMORE, and JOHN T. POFFENBARGER, Members of the Board of Review,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S MEMORANDUM REGARDING MOOTNESS

WALTER P. DeFOREST, III*
PETER D. POST
JAMES P. HOLLIHAN
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, PA 15219
(412) 288-3383

STUART I. SALTMAN
Westinghouse Electric Corporation
Westinghouse Building
Gateway Center
Pittsburgh, PA 15222

ALFRED J. LEMLEY
FURBEE, AMOS, WEBB & CRITCHFIELD
First National Bank Building
P. O. Box 1189
Fairmont, WV 26554

Counsel for Petitioner, Westinghouse Electric Corporation

*Counsel of Record

10

Table of Citations

Cases	Page
Carroll v. President & Commissioners, 393 U.S. 175 (1968)	5
County of Los Angeles v. Davis, 440 U.S. 625 (1979)	5, 6
Doe v. Bolton, 410 U.S. 179 (1973)	5
Moore v. Ogilvie, 394 U.S. 814 (1969)	5
New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979)	1
Roe v. Wade, 410 U.S. 113 (1973)	5
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)	3, 4, 5
United States v. New York Telephone Co., 434 U.S. 159 (1977)	5
United States v. W.T. Grant Co., 345 U.S. 629 (1953)	5

Statutes	
National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §151 et seq.,	passim
W. Va. Code §21A-6-3(4)	passim

This action was commenced by Petitioner Westinghouse Electric Corporation ("Westinghouse") on September 25, 1979, seeking a declaratory judgment that insofar as W. Va. Code §21A-6-3(4) authorizes state authorities to scrutinize the propriety of an employer's bargaining conduct -- that state statutory provision is preempted. Petitioner also sought an injunction against proceedings which were about to commence before the West Virginia unemployment compensation tribunal. The district court dismissed Petitioner's Complaint because it read this Court's decision in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) as holding that the doctrine of preemption was not applicable in any respect to state unemployment compensation statutes. Petition at 8.

After three sets of state proceedings wherein Westinghouse's 1979 national collective bargaining negotiations were thoroughly scrutinized by, respectively, the initial state hearing examiners, the state board of review, and the state court, it has been determined finally by the state authorities that Westinghouse had not committed any unfair practice in its bargaining. Nevertheless, the constitutional issues raised by Westinghouse's request for a declaratory judgment continue to present a justiciable controversy. Any other conclusion would effectively preclude a judicial review of those constitutional issues even though Westinghouse's collective bargaining practices have been scrutinized by the West Virginia state authorities under said §21A-6-3(4) on three occasions in the past [1/] and continue to be subject to state scrutiny and

---

1/ Petition at 10.

regulation in the future, in clear contravention of the federal labor preemption doctrine.

The West Virginia state authorities continue to regulate bargaining conduct by the development of rules as to acceptable practices in bargaining.[2/] Thus, even today they accomplish de facto regulation of collective bargaining practices of employers (including those of Westinghouse) by their awards of compensation to employees and the concomitant funding charges made against the level at which the "offending" employer must contribute to the state unemployment compensation fund. The in terrorem effect of the possibility of future awards by the state effectively regulates the bargaining conduct of employers such as Westinghouse. As a practical matter, this de facto regulation of conduct occurs even before a claim is submitted by a striker and before any proceeding is commenced against the employer. Under prior decisions of this Court, the fact that Westinghouse ultimately was able to show that its past bargaining here was conducted in accord with the state of West Virginia's requirements should not preclude Westinghouse from obtaining a declaratory judgment so that it will not be required to meet those state imposed collective bargaining standards in the future.

The applicable decisions of this Court interpreting the "case or controversy" requirement of Article III of the United States Constitution demonstrate that Westinghouse's challenge to the constitutionality of West Virginia's unemployment compensation statute has not been rendered moot by the

---

2/ Petition at 19-20.

state's denial of benefits to Westinghouse employees. The basis for Westinghouse's challenge to the West Virginia statute is that it subjects the bargaining conduct of employers to scrutiny by state authorities and thus infringes upon the exclusive jursidiction of the National Labor Relations Board ("NLRB") to define an employer's bargaining obligations under the National Labor Relations Act, 29 U.S.C. §151 et seq. ("NLRA"). This improper act of state review of an employer's bargaining conduct occurs regardless of the ultimate decision reached by the state tribunal. Therefore, Westinghouse's right to challenge the constitutionality of the West Virginia statute is not contingent upon having suffered an adverse determination by the state authorities, because the interference with national labor policy occurs long before the state determination is made. Of course, at the time that Westinghouse brought and the District Court dismissed the Complaint herein, the request for an injunction against the present state proceedings was still "live" since the state's hearing upon the propriety of Westinghouse's bargaining practices and the award of unemployment compensation benefits was then pending.

This Court's decision in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) is directly relevant here. In Super Tire, employers brought an action for injunctive and declaratory relief against various New Jersey officials, alleging that the award of public assistance funds to striking employees through state welfare programs interfered with federal labor policy and was therefore preempted by the NLRA. Before the case was tried in the district court, the labor dispute ended and the employees returned to work. The Third Circuit held the case to be moot because the strike had ended and no injunctive or

monetary relief could be awarded. Only declaratory relief regarding future applications of the policy was at issue.

In reversing the Third Circuit's determination that the case had been rendered moot, this Court emphasized the distinction between actions which request only injunctive relief and those which also request a declaratory judgment, and ruled that a dispute which presents an issue that is "capable of repetition yet evading review" is not rendered moot by events that alleviate the immediate harm and make an injunction unnecessary. 416 U.S. at 122. After noting the relatively short-term duration of strikes and the fact that regardless of the duration of the strike the impact of the challenged state policies would continue unabated, this Court found that the employer's request for a declaratory judgment presented a concrete dispute which would enable the federal judiciary to make judgments and render appropriate relief affecting the rights and interests of the parties:

> If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review." . . . To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining arrangement, except one involving a fine or other penalty, could be adjudicated only rarely, and the purpose of the Declaratory Judgment Act would be frustrated. 416 U.S. at 125-26. 3/

3/ The instant case is an even stronger example of how the effects of an unconstitutional state policy or practice can survive the termination of the immediate dispute than the situation which existed in Super Tire. In Super Tire, the public assistance benefits were paid to striking

(continued on next page)

In addition to the decision in Super Tire, supra, this Court has, on numerous occasions, applied the "capable of repetition, yet evading review" standard in ruling that a case is not necessarily rendered moot by subsequent events. For example, in Roe v. Wade, 410 U.S. 113 (1973), this Court rejected the argument that a pregnant woman's challenge to the constitutionality of a state criminal abortion statute was rendered moot by the natural termination of the woman's pregnancy. Accord, Doe v. Bolton, 410 U.S. 179 (1973).

Similarly, in Moore v. Ogilvie, 394 U.S. 814 (1969), this Court ruled that an action challenging state election laws which requested declaratory and injunctive relief did not become moot after the election was held. Even though the injunctive relief requested by plaintiffs could not be granted after the election, the fact that the state maintained the same election system reflected a "continuing controversy in the federal-state area." 394 U.S. at 816. See also United States v. New York Telephone Co., 434 U.S. 159, 165 n.6 (1977); Carroll v. President & Commissioners, 393 U.S. 175, 178-79 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953).

3/ (continued from previous page)

employees regardless of the employer's conduct or bargaining practices. Thus, once the strike ended, there was no effect upon an employer's future bargaining practices, since the assistance fund payments also ended. In the instant case, on the other hand, Westinghouse continues to be subject to the state scrutiny of its bargaining practices after the employees have returned to work, and this potential of state scrutiny necessarily continues to affect the present and future bargaining conduct of Westinghouse.

More recently, in County of Los Angeles v. Davis, 440 U.S. 625 (1979), this Court set forth the test for determining if a case has been rendered moot as follows:

> [J]urisdiction, properly acquired, may abate if the case becomes moot because
> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur . . . and
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation . . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. 440 U.S. at 631.

With respect to the first of those criteria for judging mootness, it is clear that there is every reason to believe that the unconstitutional infringement by the West Virginia unemployment compensation statute upon the NLRB's exclusive jurisdiction to scrutinize the propriety of bargaining practices will recur. The instant case is the third time that Westinghouse has been required to justify the propriety of its national collective bargaining practices to West Virginia authorities as a result of unemployment compensation claims filed by striking employees at the Fairmont, West Virginia plant. Petition at 10. Moreover, the Respondents have blithely asserted to this Court that even if the NLRB makes a determination as to the propriety of an employer's bargaining conduct in a given situation, the state authorities are free to reach a different conclusion under the same facts and are not affected by the NLRB's conclusion that an employer has satisfied its

bargaining obligations under the NLRA.[4/] These facts demonstrate that Westinghouse, as well as other employers in the state of West Virginia, will continue to be exposed to the threat of state scrutiny of collective bargaining practices in the future, as well as to conflicting standards for collective bargaining conduct to be separately developed by the NLRB and the state.

It is equally clear that interim events -- in this case, the denial of benefits to Westinghouse employees who were on strike -- have not "completely and irrevocably eradicated the effects" of West Virginia's unconstitutional interference with the development of a uniform national labor policy. In fact, as discussed above, the ultimate decision as to whether those employees are eligible for benefits is essentially irrelevant to the fact that Westinghouse continues to be required to justify the propriety of its bargaining conduct to West Virginia authorities (or, for that matter, to any other state that desires to regulate collective bargaining under its unemployment compensation laws). The effects of this state interference with national labor policy will continue to be felt by Westinghouse each time it enters into collective bargaining negotiations, because its negotiators will not only be required to conform to federal standards for good faith bargaining, but will also be required to meet state standards or face the risk of exposing the company to massive unemployment compensation benefit liability.

4/ See Response to Petition at 15.

For these reasons, the instant case presents a live controversy notwithstanding the decision of the West Virginia circuit court upholding the denial of benefits to Westinghouse's striking employees. As this Court recognized in decisions such as Super Tire, supra, and Roe v. Wade, supra, actions for declaratory relief are not rendered moot by interim events if meaningful judicial review would be unavailable because of the nature of the injury alleged. In the instant case, the injury which flows from the West Virginia unemployment compensation statute is not merely the economic cost of an adverse determination as to the employees' eligibility for benefits, but also includes the effect upon an employer's collective bargaining practices caused by exposure to varying and possibly conflicting standards of bargaining. Because this latter effect is a continuing one, Westinghouse's challenge to the constitutionality of W. Va. Code §21A-6-3(4) has not been rendered moot by the state's denial of benefits to the Westinghouse employees.

Accordingly, we believe that this Court should take review of this case in order to resolve the conflict between the West Virginia statute, which directs the state authorities to determine whether employees have been "denied the right of collective bargaining under generally prevailing conditions," and the NLRA, which commits such determinations to the exclusive jurisdiction of the NLRB.

CONCLUSION

For the foregoing reasons and on the basis of the foregoing authorities, Westinghouse respectfully submits that this case is not moot. Westinghouse prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

Walter P. DeForest, III

WALTER P. DeFOREST, III*
PETER D. POST
JAMES P. HOLLIHAN

REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, PA 15219

STUART I. SALTMAN
Westinghouse Electric
Corporation
Westinghouse Building
Gateway Center
Pittsburgh, PA 15222

ALFRED J. LEMLEY
FURBEE, AMOS, WEBB & CRITCHFIELD
First National Bank Building
P. O. Box 1189
Fairmont, WV 26554

Counsel for Petitioner,
Westinghouse Electric Corporation

*Counsel of Record

CERTIFICATE OF SERVICE

I, Walter P. DeForest, III, counsel of record for Petitioner Westinghouse Electric Corporation and a member of the Bar of the Supreme Court, hereby certify that a true and correct copy of Petitioner's Memorandum Regarding Mootness has been mailed, this 4th day of June, 1981, by first-class mail, postage prepaid, to the following counsel:

Jack O. Friedman
Suite 745, One Valley Square
P. O. Box 3545
Charleston, WV 25334

Margaret L. Workman
1026 Commerce Square
Charleston, WV 25301

All parties required to be served have been served.

Walter P. DeForest, III

Walter P. DeForest, III